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No. 698

In the Supreme Court of the United States

October Term, 1957

HARRY SACHER, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The majority and two dissenting opinions in the Court of Appeals (Appendix B to the Petition, pp. 1-16, 17-22, 23), sitting *en banc*, which were rendered following this Court's remand of the case (354 U.S. 930) for consideration in the light of *Watkins* v. *United States*, 354 U.S. 178, have not yet been reported. The original opinion of the three-judge division of the Court of Appeals is reported at 240 F. 2d 46.

The opinion of the District Court denying petitioner's motion to dismiss the indictment (R. 75-78) is reported at 139 F. Supp. 853. The opinion of the District Court (R. 64-74) rendered in conjunction with its verdict finding petitioner guilty as charged (a jury having been waived) is reported at 139 F. Supp. 855.

JURISDICTION

The judgment of the Court of Appeals (Pet. 47-48) was entered on January 31, 1958. The petition for a writ of certiorari was filed on March 3, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED [1]

1. Whether, in the circumstances presented by this record, and in the light of *Watkins* v. *United States*, 354 U.S. 178, the pertinence of the questions to the subject matter of the Senate Internal Security Subcommittee's inquiry was or should have been sufficiently clear to petitioner to sustain his conviction under 2 U.S.C. 192 for refusing to answer them.

2. Whether Senate Resolution 366, 81st Congress, which created the Internal Security Subcommittee and defined its powers, authorized it to require answers to these questions.

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[1] We omit from the "Questions Presented" issues which were urged in petitioner's prior petition for certiorari (No. 884, Oct. Term, 1956) and are repeated in the present petition, but with respect to which, because they are not affected by the *Watkins* decision, we rest on our replies set forth in our earlier brief in opposition. See *infra*, p. 27, including fn. 12.

STATUTE AND RESOLUTION INVOLVED

2 U.S.C. 192 (R.S. 102, as amended) provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

S. Res. 366, 81st Cong., 2d sess. (1950) (96 Cong. Rec. 16872) provides in pertinent part:

> *Resolved*, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist

movement or any other movement seeking to overthrow the Government of the United States by force and violence.[2]

STATEMENT

On December 21, 1955, petitioner was charged in a three-count indictment (R. 2-3), returned in the United States District Court for the District of Columbia, with having refused, in violation of 2 U.S.C. 192 (*supra*, p. 3), to answer three questions, pertinent to the matter under inquiry, put to him by a subcommittee of the Internal Security Subcommittee of the Senate Committee on the Judiciary, *viz.*, whether he then was or ever had been a member of the Communist Party (counts 1 and 2) and whether he then was or ever had been a member of the "Lawyers' Section" of that organization (count 3). Petitioner, having waived his right to a trial by jury (Tr. 3-4), was found guilty on all counts and was sentenced generally to six months' imprisonment and to pay a fine of $1,000 (R. 10).

On appeal to the Court of Appeals for the District of Columbia Circuit, the judgment of conviction was, on January 3, 1957, unanimously affirmed by a three-judge division of that court (240 F. 2d 46). Thereafter, this Court, on June 24, 1957 (354 U.S. 930), on petition for a writ of certiorari to review this judgment, granted the petition, vacated the judgment of affirmance, and remanded the case to the Court of

[2] The resolution was introduced in evidence as G. Ex. 1 (Tr. 17) and its full text is set forth in the printed Record at pages 80-82.

Appeals "for consideration in light of *Watkins* v. *United States*, 354 U.S. 178". The case was thereafter re-briefed and reargued in the Court of Appeals, which *sua sponte* determined to hear the case on remand *en banc*. On January 31, 1958, the Court of Appeals again affirmed the judgment of conviction (Appendix B to the Petition, pp. 1-16), four judges dissenting (*id.*, pp. 17-22, 23).

The pertinent facts may be summarized as follows:

On several occasions during the year 1952, Harvey Matusow appeared as a witness before the Internal Security Subcommittee of the Senate Committee on the Judiciary and gave sworn testimony concerning, among other subjects, the International Union of Mine, Mill and Smelter Workers (R. 100)—subsequently to be described by the Subcommittee as "Communist controlled" (G. Ex. 12, p. 79). In or about February 1955, Matusow publicly recanted this and other testimony given by him in other proceedings, saying that he had "lied when he testified before this subcommittee and on other occasions" (R. 100). On February 21, 1955 (R. 99), the Subcommittee commenced a series of hearings "to inquire into this whole matter" and to determine whether Matusow "told the truth in his original testimony before us and is now lying when he says that his original testimony was not the truth," or whether "part of what he told us was true and part was untrue," or whether "he never tells the truth by intent" (R. 100).

The Chairman of the Subcommittee, in opening the hearings, announced that the Subcommittee intended

to determine whether Matusow might have been influenced, in making his recantations, by considerations of "low personal greed", or whether he had been the "victim of pressure brought by Communists" and others having "a vested interest in concealing the Communist conspiracy" and had "finally broken under this pressure", or whether there might be some other explanation (R. 100).

Petitioner, one of the witnesses called in the inquiry, appeared before the Subcommittee, presided over by Senator McClellan, on April 19, 1955 (R. 11).

Information and reports in the possession of the committee when it called petitioner.—At the time of petitioner's appearance, the committee had in its files "evidence indicative of the fact that this whole matter"—*i.e.*, the Matusow recantations—was part of "a conspiracy having as its primary purpose the discrediting of Government witnesses [in prosecutions against members of the Communist Party]" and "the securing of new trials for convicted Communists" (R. 30-31). It was part of this plan, according to the committee's information, that an effort was to have been made to induce Matusow to execute affidavits recanting testimony previously given by him as a prosecution witness in the criminal trials of *Clinton Jencks* and *Elizabeth Gurley Flynn, et al.* (R. 29-30); that, "[a]s a device to get Mr. Matusow to do this," Matusow was "to write a book," the "money to pay for" which was to be "provided through the Mine, Mill and Smelter Workers Union" (R. 30); and that the book was to be published by Cameron

& Kahn, a publishing firm whose members were, according to the committee's information, both members of the Communist Party (R. 31-32, 36).

The committee's information further indicated that this plan had already been carried out to the extent that the book had been published (R. 30, 32), that it "contained chapters on the two trials" above referred to (R. 30), and that "[t]he affidavits [had been] prepared", and Matusow had been "induced to sign" them (*ibid.*). The committee further had information that Matusow's affidavit in the *Jencks* case "had been hatched by two attorneys", one of whom was Nathan Witt (*ibid.*); that petitioner "had received the [*Flynn* case] affidavit and certain other papers from Mr. Matusow" for use in applying for new trials for the defendants in that case, in which petitioner was of counsel (R. 31); and that the "entire Matusow proceeding, his recantation, the writing of the book, [and] the whole drive to discredit Government witnesses * * * were all the product of the planning of a group of lawyers within the Communist Party" (R. 33).

The committee had, in addition, "information respecting Mr. Sacher's connections with Communist and Communist front organizations going back * * * to at least as early as 1937" (R. 14).[4] Among other such associations, the committee had information that petitioner had, in 1950, been present at a "birthday

[4] Details of these Communist and Communist-front associations, all of which were in the committee's files, are set forth at R. 25-27 and in the Court of Appeals' former opinion (240 F.2d 46, 49-50).

party for Alexander Bittelman", held at the New York headquarters of the Communist Party and "attended only by high functionaries" of the Party (R. 25), and that he had, in 1947, attended a meeting in Boston at the home of Angus Cameron (of the publishing firm which later published Matusow's book), which meeting was also attended by "a known Communist section leader" (R. 36).

The committee further had reports that there existed a "lawyers commission or a law commission of the Communist Party", consisting of "a group of high functionaries of the party to whom had been delegated the formulation * * * of legal strategy for the party"; that "included in that group were Nathan Witt and Harry Sacher"; and that "probably one of those two was the head of it" (R. 36).

Finally, at the time of petitioner's appearance, the committee was satisfied that money had been received by Matusow "out of the treasury [of] the Mine, Mill and Smelter Workers * * * through Nathan Witt and Cameron and Kahn" (R. 34-35).

The reason that petitioner was summoned to testify, according to the committee's counsel, was in order to determine "to what extent he participated in the planning for the legal strategy of" the recantations (R. 35). Thus, as noted on the former opinion of the Court of Appeals (240 F. 2d 46, 50),

> * * * when the Subcommittee called appellant as a witness, it had information as to the following: (a) reports linking appellant with the Communist Party; (b) reports linking the Com-

munist Party with a conspiracy to bring about a recantation by Matusow of his testimony against the Communist Party and members thereof; and (c) reports linking appellant with this alleged conspiracy.

Petitioner's testimony at the committee hearing.—At the committee hearing, petitioner testified that he first met Matusow two days before the latter took the stand as a witness in support of a motion for a new trial in the *Flynn* case in the United States District Court for the Southern District of New York (R. 44); that he, petitioner, was one of the attorneys in the proceedings on the motion (*ibid.*); that, in connection with those proceedings, Matusow had given him numerous documents (R. 45, 48-49), including a copy of a 75-page report which he had some years previously given to the FBI and other agencies of the Government (R. 45), a diary recording events occurring over a period of several years in the recent past (R. 48), and papers used in the preparation of testimony given by him in a number of cases before the Subversive Activities Control Board (R. 49). During the course of the questioning, petitioner was informed that the "primary purpose of this testimony is to establish a relationship or contact you have had with Mr. Matusow, whom this committee is investigating * * *" (R. 46).

Petitioner denied having received from Matusow the affidavit of recantation used in the *Flynn* case (R. 49), denied having had anything to do with the preparation of the affidavit (R. 50), and denied ever having discussed it with Witt prior to its execution (R. 49-50), but admitted that he may have discussed

it with Witt following its execution, during the course of the *Flynn* proceedings, inasmuch as Witt, as counsel for Jencks, was interested in those proceedings (R. 50).

At this point in the proceedings, committee counsel asked petitioner whether he had "ever served a prison sentence" (R. 50). Petitioner asked the committee chairman, Senator McClellan, what the purpose of this question was (*ibid.*). In reply to the chairman's query as to the purpose of the question, counsel stated that "among the measures under consideration by this committee is proposed legislation for the purpose of fixing additional standards with respect to the practice of law in the Federal Courts", including legislation "which would prohibit members of the Communist Party from practicing law in Federal Courts", and that it was "germane to the consideration of such legislation to inquire into the circumstances involving the practice of law in Federal Courts by persons who are Communists" (R. 50-51). Counsel further stated that he believed that "the inquiries made here and other inquiries which have been made and which will be made in this Matusow case have bearing upon that legislative problem now pending before the committee" (R. 51). The chairman told counsel he "should lay a foundation for that first by asking the witness if he is a member of the Communist Party, if he has ever been, and so forth" (R. 51).

Petitioner at this point asked and received leave to be heard (R. 51). He made a brief statement to the committee, in the course of which he stated that "my understanding, when I came here was, as given

to me by those who served the subpoena to me, that I was going to be interrogated concerning the Matusow recantation" and protested that an inquiry into his "political beliefs or associations" seemed to him to be "diversionary in character" (R. 51). He concluded his objection by stating (R. 51-52):

> Let there not be made here an attempt to prejudice the determination not only by Judge Dimock, but by the people of the United States as to whether or not Matusow lied when he testified at the Flynn trial. Now I submit, Mr. Chairman, that this—if I may say so—that this is doing a disservice to the administration of justice.

The Chairman, immediately following the foregoing remarks of petitioner, replied (R. 52):

> That is what we are trying to find out. Now let us proceed, Mr. Counsel, and ask the proper questions to lay the foundation for this.

Petitioner was then asked whether he was a member of the Communist Party (R. 52-53)—this being the question on which count 1 of the indictment is based (*supra*, p. 4). He refused to answer, asserting that "it is inconsistent with the dignity of any man to be compelled to disclose his political, religious, economic, social, or any other views" and that "an inquiry to me concerning this matter is not pertinent to anything with which this committee is concerned, and is not relevant to any inquiry that may properly be made of me" (R. 52). He specifically disclaimed reliance on the Fifth Amendment (R. 52). The Chairman overruled petitioner's objections and di-

rected him to answer, but he still refused (R. 53). The Chairman then asked petitioner whether he had "ever been" a member of the Party (the question underlying count 2; *supra*, p. 4). Petitioner refused, on substantially the same grounds, to answer that question also (R. 53).

Petitioner then stated, in reply to another question from the Chairman, that he had never been a member of any organization which he believed to have taught or advocated the forcible overthrow of the United States Government. He was then again asked by the committee counsel whether he had "ever served a prison sentence" (R. 53). On this occasion petitioner answered the question, replying that he had served a prison sentence—for contempt of court (R. 53).

Questions were then asked about meetings petitioner had had with leaders of the Communist Party (R. 54). He replied that, apart from meetings which he had had with Party leaders who were clients of his, and which he had attended in his professional capacity, he could not recall attending any such meetings (R. 54). He said he had "no recollection" of having attended a 1950 birthday party for Alexander Bittelman, held in the New York headquarters of the Communist Party (R. 54-55)—this being one of the Party gatherings at which petitioner, according to information in the Committee's files, had been present (*supra*, pp. 7-8). He was then asked whether he had "any connection with the legal commission or law commission of the Communist Party" (R. 55). When he replied that he did not "know of any such organization", he was asked whether he then was or ever

had been "a member of the Lawyers' Section of the Communist Party" (R. 55). This is the question on which count 3 of the indictment is based. (*supra*, p. 4). Petitioner replied (R. 55):

> Mr. Chairman, I have declined before and I decline again * * * [o]n the grounds that I have already stated * * *, and I reemphasize that there is nothing in the purposes of the committee or the Congress which comprehends the validity, the pertinency or the relevance of an inquiry to me concerning my political beliefs or affiliations. I respectfully decline to answer that question.

There followed a colloquy between petitioner and the committee chairman (R. 55-57) in the course of which petitioner made it emphatically clear that he would, under no circumstances or conditions, answer the pending question or any other question calculated to inquire into his "innermost thoughts and beliefs, whether they be on politics, religion or anything else" "on the grounds that it is incompatible with the dignity of the individual to make compulsory disclosure of his thoughts and his ideas and his beliefs" (R. 56; see also R. 57). On being ordered by the chairman to answer the question notwithstanding his objections, petitioner refused (R. 57).[4]

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[4] Immediately following this refusal, petitioner was asked whether he had ever attended a "Communist meeting at the home of Angus Cameron" (R. 57). As previously noted, Cameron was one of the two members of the firm of Cameron & Kahn, which, in or about 1955, published Matusow's book accusing himself of past perjuries, and the Committee had information (1) that both Cameron and Kahn were

ARGUMENT

I.

Petitioner's principal contention (Pet. 25-36), for which he relies on the *Watkins* decision, 354 U.S. 178 (Pet. 25), is that "the pertinency of the questions to the matter under inquiry was not communicated to him with the explicitness and clarity required by the due process clause" (Pet. 25).

Here, unlike *Watkins*, the precise "matter under inquiry"—Matusow's recantation and what if anything petitioner had to do with it—is not in dispute (Pet. 27; R. 51). As petitioner conceded in his prior petition for certiorari (No. 884, Oct. Term, 1956, p. 31), this subject "was clearly defined by the subcommittee and petitioner was specifically notified as to what that subject was at the time he was subpoenaed." The burden of petitioner's argument is that the committee, midway during his appearance, abandoned that subject and took up another entirely different one, *i.e.*, the proposed legislation which the committee had under consideration which would have barred lawyer members of the Communist Party from practicing in the federal courts (Pet. 28; R.

Communist Party members, and (2) that petitioner was present at a Party meeting in Cameron's home in 1947 (see *supra*, pp. 6-7, 8). Petitioner, after first stating that he had "no recollection" of ever having been at Cameron's home (R. 57), admitted, upon further questioning, that he had been in Cameron's home "once, * * * in Boston" (R. 58). He insisted, however, that he did not know "what meeting took place there [on this occasion], whether it was Communist or not" (R. 58).

50); that the questions which petitioner refused to answer (see *supra*, p. 4) were asked during the committee's consideration of this new subject; that they were pertinent to it alone, if pertinent at all; and that the committee itself related the questions (so far as pertinency is concerned) to the new subject. At least, it is argued, if the Matusow inquiry was not abandoned, and if the questions in issue were in fact asked in connection with that inquiry, the "connective reasoning" (*Watkins*, 354 U.S. at 215) linking the questions with that inquiry was not brought home to petitioner with the degree of definiteness and clarity required under the due process clause for a criminal conviction for refusal to answer.

We submit, on the other hand, that the Matusow inquiry was never abandoned by the committee; that the "brief excursion" [5] into proposed legislation barring Communists from federal practice was not inconsistent with the committee's continued consideration of the Matusow matter, and did not terminate or substantially interrupt that inquiry; that, even if this brief "excursion" be considered a digression, the digression was terminated and the Matusow inquiry resumed before the asking of the questions here involved, and certainly before the asking of the third question, underlying the third count of the indictment; that all three questions were in fact highly pertinent to the Matusow inquiry; and that peti-

[5] The expression is that of the court below in its former opinion (240 F. 2d 46, 53). See, also, the lower court's opinion rendered following the remand (Pet. App. 7).

tioner knew or reasonably should have known that they were so.[6]

(1). Petitioner insists that "the record objectively shows a *complete abandonment* of the Matusow subject" (Pet. 31, emphasis added) when the committee counsel, in reply to the chairman's query as to the purpose of counsel's question as to whether petitioner had ever served a prison sentence, referred the chairman to the proposed legislation under consideration by the committee prohibiting Communist Party members from practicing law in the Federal courts (R. 50), and the chairman directed counsel to "lay a foundation for that first by asking the witness if he is a member of the Communist Party, if he has ever been, and so forth" (R. 51). However, the court below rightly held that "There was no abandonment of the 'Matusow Case' inquiry by reason of the brief excursion into discussion of possible legislation relating to law practice" (see the former opinion, 240 F. 2d at 53). There was no incompatibility between

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[6] Petitioner, referring to Senate Resolution 366 (*supra*, pp. 3-4), creating the Internal Security Subcommittee, argues (Pet. 25-27) that "a claim that the resolution clarified the pertinency of the questions would be absurd" (Pet. 27). Of course, we make no such claim. The resolution, defining the general boundaries of the Subcommittee's jurisdiction, authorized and empowered the committee to undertake the inquiry in which it was engaged when Matusow originally testified before it (see *supra*, p. 5), as well as the inquiry into the circumstances surrounding Matusow's later recantation of that testimony, but the pertinency of the questions which petitioner refused to answer during the course of the latter inquiry is to be determined, as it is proper to do (*Watkins* v. *United States*, 354 U.S. 178), from the entire complex of circumstances attending their asking.

the subject of the Matusow inquiry and the proposed legislation. Rather, the two subjects were interrelated.

The committee counsel, in referring the chairman to the proposed legislation, said (R. 50-51):

> * * * It is germane to the consideration of such legislation to inquire into the circumstances involving the practice of law in Federal Courts by persons who are Communists and by persons who are defending Communists. *I believe that the inquiries made here and other inquiries which have been made and which will be made in this Matusow case have bearing upon that legislative problem now pending before the committee.* [Emphasis added]

It is thus certainly clear that the committee counsel did not consider the subject of the proposed legislation to be alien to the Matusow inquiry. Nor, we submit, did the chairman, if his remarks about "lay[ing] a foundation" are considered in the context in which he uttered them, *i.e.*, immediately following the above-quoted observations of counsel.

In short, the brief colloquy concerning proposed legislation relating to practice in the Federal courts, taken in its context, shows, not an abandonment of the Matusow inquiry, but rather a logical connection between the Matusow recantation and the proposed legislation. The Matusow recantation, as we have pointed out (*supra*, pp. 5-10), involved important federal proceedings both in Congress and in the courts, and the committee had information tending to show that it was part of a Communist conspiracy "having as its primary purpose the discrediting of Government

witnesses" and "the securing of new trials for convicted Communists" (R. 30-31). So viewed, there was nothing essentially digressionary in the brief discussion about proposed legislation prohibiting the practice of law by Communists in the Federal courts.[7]

(2). But even if it be assumed for argument purposes that the discussion about proposed legislation relating to law practice constituted a temporary departure from the main theme of the hearing, *i.e.*, petitioner's connection (if any) with the Matusow recantation, the majority below were correct in holding that "the digression or 'excursion' was promptly terminated and the line of questions brought back"—before the asking of the questions here in issue—"to 'whether Matusow lied when he testified' " (Pet. App. 7).

As noted in the opinion below, petitioner, in the course of his statement objecting to what he conceived to be a subject alien to the inquiry into the circumstances of the Matusow recantation (see R. 51-52), "repeated three times that 'Matusow lied' " (Pet. App. 7, fn. 9), and concluded his remarks as follows (*ibid.*; R. 51-52):

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[7] Two months after petitioner's appearance before the Subcommittee, the chairman of the Subcommittee in fact introduced a bill in Congress requiring attorneys practicing in the Federal courts or before executive agencies of the Federal Government, or representing witnesses appearing before congressional committees, to file non-Communist affidavits (S. 2326, 84th Cong., 1st sess. [G. Ex. 10, R. 86]). See also the report of the Subcommittee on the "Significance of the Matusow Case", which included an account of petitioner's refusal to answer questions and a recommendation that the above legislation be enacted (G. Ex. 12, R. 87, 94-98).

> * * * Let there not be made here an attempt to prejudice the determination not only by Judge Dimock [the presiding judge at the *Flynn* trial (see *supra*, pp. 6-10)], but by the people of the United States as to whether or not Matusow lied when he testified at the Flynn trial. Now I submit, Mr. Chairman, that this—if I may say so—that this is doing a disservice to the administration of justice.

At this point, as the court notes (Pet. App. 7, fn. 9), the committee chairman said (R. 52):

> That is what we are trying to find out. Now let us proceed, Mr. Counsel, and ask the proper questions to lay the foundation for this.

The count-1 question—whether petitioner was a member of the Communist Party—was then asked (R. 52), and the count-2 question—whether he had ever been a member of the Party—was asked shortly thereafter (R. 53).

We submit that the Court of Appeals is clearly correct in interpreting the chairman's statement, "That is what we are trying to find out," as referring to petitioner's thrice-repeated charge that "Matusow lied." So viewed, the chairman's statement, as a whole, is reasonably read as terminating the "excursion" into the subject of proposed legislation and getting the inquiry back on to the track of the "Matusow recantation"—assuming that it had ever left it in any substantial sense.

(3). In any event, we submit that the count-3 question—whether petitioner was or ever had been a member of the "Lawyers' Section of the Communist Party" (*supra*, p. 4; R. 55)—is invulnerable to any of petitioner's criticisms based on the alleged "di-

version" or "excursion." If so, since petitioner's general sentence (see *supra*, p. 4) is sustainable under that count alone, it is unnecessary to consider whether the other counts are valid. *Claassen* v. *United States*, 142 U.S. 140, 146-147; *United States* v. *Trenton Potteries*, 273 U.S. 392, 401-402; cf. *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, fn. 1.

When the question and refusal on which count 3 is based took place, the discussion of the proposed legislation relating to law practice had clearly ended and the inquiry into the subject of the Matusow recantation clearly resumed (if it had ever been departed from). For the count-3 question was not asked until some time after petitioner was asked for the second time—and this time he answered (in the affirmative) —the question of whether he had "ever served a prison sentence" (*supra*, pp. 12-13; R. 53, 55). Since the record is clear that it was this question (when first asked) which precipitated the "excursion" into the subject of proposed legislation relating to law practice (see *supra*, p. 10), the committee's "digression" into the latter subject (if there was one) must certainly be considered to have come to an end, at the latest, when petitioner was again asked (and this time answered) whether he had ever served such a sentence.

Significantly, both the questions immediately preceding and those immediately following the count-3 question probed into matters in which the committee was especially interested in connection with its inquiry into the Matusow recantation and the part, if any, which petitioner played in a "Communist con-

spiracy" to bring about that recantation. The questions immediately before the count-3 question had to do with whether petitioner attended the 1950 birthday party for AlexanderBittelman (R. 54-55; see *supra*, pp. 12-13); the committee, as we have seen, had information to the effect that petitioner did attend this party (*supra*, pp. 7-8), and this information, deemed by the committee to be pertinent to the Matusow inquiry, constituted one of the reasons "which caused it to call Mr. Sacher" (R. 25). The questions immediately after the count-3 question related to whether petitioner attended a 1947 Party meeting in the home of Angus Cameron, of the publishing firm which issued Matusow's book (R. 57-58; see *supra*, pp. 13-14, fn. 4); the committee, as has also been pointed out, likewise had information to the effect that petitioner did attend such a meeting (*supra*, p. 8) and such information had a manifest relevance to the Matusow inquiry.[8]

Thus, the context in which the count-3 question was asked—in the midst of other questions having clear pertinence to the Matusow inquiry—is clear proof that the committee had already returned to that inquiry (if it ever left it). And since the count-3 question—whether petitioner was or ever had been a member of the "Lawyers' Section of the Communist Party"—was clearly germane to the committee's inquiry into whether he was party to a "Communist conspiracy" to procure a false recantation by Matu-

[8] This constituted another of the reasons why the committee summoned petitioner to testify in its Matusow inquiry (R. 36).

sow with the objective of casting discredit on anti-Party witnesses in general (see sub-point (4), immediately following), it follows that the third count is certainly not subject to the invalidity allegedly infecting the other two counts.

(4). That the questions underlying all three counts were pertinent *in fact* to the Matusow inquiry is clear. As noted by the court below, "It needs no discussion to see that [the question of whether or not the petitioner was a member of the Communist Party] was pertinent to the Matusow inquiry to find out whether [petitioner] had any connection with a Communist conspiracy to induce Matusow to recant" (Pet. App. 9). "[W]hen the subcommittee called Sacher it had (1) reports linking Sacher with the Communist Party, (2) reports linking the Communist Party with a conspiracy to bring about Matusow's recantation, [and] (3) reports linking Sacher as one of the lawyers party to this conspiracy" (*id.*, fn. 11). Hence, "[w]hether [petitioner] was a Communist was logically one of a series of questions designed to disclose the nature of his connection, if any, with the conspiracy" (Pet. App. 9).

(5). Finally, it is submitted that petitioner knew or reasonably should have known that the questions were pertinent to the Matusow inquiry. It is unnecessary to elaborate on the thorough treatment of this point in the majority opinion below (Pet. App. 11-16). It is sufficient to emphasize that, as the court points out (*id.* 13-14), petitioner's "first words after the Count 1 question [see R. 52], were that he understood he was called to testify about the Matusow recantation and he was prepared to answer ques-

tions concerning his participation in connection with that matter, but he simply was not going to discuss his 'beliefs, religious, political, economic or social.'" "Thus," as the court continues (Pet. App. 14),

> he demonstrated he knew the subject was the Matusow case, but claimed he did not think questions as to his possible Communist Party membership were pertinent to it. In so doing appellant showed he was taking the risks inherent in refusing to answer. Of course we are not foreclosed by appellant's statement that *he* could see no pertinency or relationship between Communist Party affiliation, if any, and the Matusow recantation. It is enough for our purpose that he *should* have seen the relationship and hence the pertinency. [Emphasis in the original][9]

Furthermore, it is clear from the record that, even if the pertinency of the questions had been obscure, petitioner himself precluded a fuller and more detailed explanation of the way in which they were pertinent. For petitioner made it emphatically plain that his refusals to answer questions relating to Communist affiliations were absolute and unconditional. He refused "categorically", he told the chairman, to discuss his "political" beliefs (which he equated to answering questions pertaining to his Communist affiliations) because to do so was "inconsistent with the dignity of any man" (R. 52).

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[9] Compare *Sinclair* v. *United States*, 279 U.S. 263, 299: "The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and § 102 made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense."

There was, he said, "*nothing* in the purposes of the committee *or the Congress* which comprehends the validity, the pertinency or the relevance of an inquiry to me concerning my political beliefs or affiliations" (R. 55, emphasis added). These and other remarks of petitioner at the hearing (see R. 51-53, 55-57) show that he was *not* basing his refusals to answer on any departure by the committee from the main subject of the inquiry. He did not, in other words, tie his refusals to the committee's "brief excursion." His refusals were unqualified and unconditional.

Petitioner's present arguments with respect to pertinency are afterthoughts, which have no apparent relation to his conduct at the hearing. And it is hardly conceivable that, had he signified to the committee that one of the reasons for declining to answer questions having to do with Communist affiliations was his belief that they purported to relate to a matter other than the Matusow inquiry, the chairman would not have promptly and specifically related the questions to that inquiry. Petitioner, of course, did nothing of the sort. His present efforts to overturn his conviction on the basis of objections which could have been met if they had been raised at the proper time should therefore fail.[10]

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[10] The dissent of Judge Fahy, with whom Judges Edgerton and Bazelon joined, is predicated, in part at least, on the view that "[t]he courts should be slow * * * to hold that a person shall be 'compelled' over his objection publicly 'to be a witness against himself' by supplying *obviously* self-incriminating information, particularly when the area protected by the First Amendment is threatened [footnote reference omitted], though he does not rest his objection on the Fifth" (Pet. App. 21, emphasis in the original). There is,

II.

Petitioner next argues (Pet. 36-37) that Senate Resolution 366 (*supra*, pp. 3-4), which created the Internal Security Subcommittee and defined its powers, did not authorize the Subcommittee to "require answers to questions such as those put to petitioner" (Pet. 36). But if those questions were clearly pertinent—as they were (see *supra*, p. 22)—to an inquiry in which the Subcommittee was legitimately engaged, the Subcommittee obviously had authority to ask them.

Nor can there be any doubt that the Subcommittee's inquiry into the Matusow matter was a legitimate one. Matusow had in the recent past appeared before the Subcommittee and given extensive testimony in the committee's field of interest (see *supra*, p. 5; R. 100). He had now repudiated that testimony and declared it perjured. It was a matter of legitimate concern to the committee to inquire into the circumstances attending this recantation.[11]

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however, we think, as observed by the majority (*id.* at 16), no warrant for this confusion of the protections afforded by these respective Amendments. As the majority point out, "The use of the First Amendment to shield one from supplying 'obviously incriminating information about himself' would be a perversion of the Constitution, needless so long as the Fifth Amendment stands. Should this perversion be sanctioned it would not be long before repeated use of the First as a haven from incrimination would 'contaminate' that Amendment [in the same manner that the Fifth Amendment has, in the minds of some, been brought into "disrepute"]".

[11] For this reason, there is no merit to petitioner's contention—which he is now advancing for the first time, so

If petitioner's point be that the Subcommittee had no authority to inquire into the subject into which it was probing when Matusow first appeared and gave his subsequently repudiated testimony—the Communist Party's influence in and penetration of the labor movement and other fields (see *supra*, p. 5), and R. 100)—the argument is clearly without merit. The Subcommittee's authorizing resolution (Senate Resolution 366) empowered it to make a "complete and continuing study and investigation" of, *inter alia*, "the extent, nature, and effects of subversive activities in the United States * * *, including * * * infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement * * *." This was a mandate from the Senate to investigate Communism's impact upon the various phases of the national economy and the "infiltration" by members of the Communist Party into other groups and organizations. There is nothing in the *Watkins* decision, involving the less specific authorizing resolution of the House Un-American Activities

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far as we have been able to determine, in this second petition for certiorari—that "[t]he subcommittee was not authorized by the full committee to conduct the [Matusow] inquiry" (Pet. 39). The Subcommittee's authority to conduct the Matusow inquiry derived from its basic enabling resolution, *i.e.*, Senate Resolution 366, 81st Congress (*supra*, pp. 3-4), and the parent Judiciary Committee's resolution of January 20, 1955, "continu[ing]" the Subcommittee "during the 84th Congress" (G. Ex. 2, R. 82-83). A subcommittee does not need a new authorization for each particular inquiry it conducts. It is sufficient if the inquiry comes within the scope of its general powers.

Committee, indicating that the Senate Internal Security Subcommittee lacks authority under its empowering resolution to inquire into the scope and impact of Communism on American life and institutions.

Furthermore, when Matusow originally appeared before the Subcommittee, he appeared as a willing, "friendly" witness. The crux of *Watkins*' criticism, on grounds of vagueness, of the House Committee's enabling resolution was with respect to its authorization for compelling unwilling testimony.

III.

Petitioner's remaining contentions are in substance repetitions of points made in his earlier petition for certiorari. Since none is affected by the *Watkins* decision, we rest on our replies to these points in our earlier brief in opposition.[12]

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[12] On the constitutionality of Senate Resolution 366, if construed as authorizing the asking of the questions here in issue (Pet. 37-39), see our brief in opposition (No. 884, Oct. Term, 1956), pp. 19-20; see also, on this issue, the majority opinion below at Pet. App. 3-4. On the question of petitioner's several challenges to the sufficiency of the indictment (Pet. 39-44), see brief in opposition, pp. 18-19. And on the question of the alleged denial of his right to a "fair and impartial grand jury" (Pet. 44-45), see brief in opposition, pp. 22-23, fn. 9.

In our earlier brief in opposition, it was inadvertently stated that the grand jury point was not raised in the Court of Appeals (p. 22). As pointed out in his reply to our opposition (at pp. 11-12), petitioner, in a footnote reference in his Court of Appeals brief, "sav[ed]" the point without briefing it.

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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